United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

77-7220

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

United States Court of Appeals

For the Second Circuit.

CARL F. HOLLANDER,
Plaintiff-Appellant,

against

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT-APPELLEE.

ROGERS & WELLS
Attorneys for Defendant-Appellee
200 Park Avenue
New York, N. Y. 10017
(212) 972-7000

Of Counsel
JOHN H. CARLEY

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1977

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

CARL F. HOLLANDER, :

Plaintiff-Appellant, : Docket No. 77-7220

-against- :

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, :

Defendant-Appellee. :

- X

On Appeal from the United States District Court for the Southern District of New York

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BRIEF FOR DEFENDANT-APPELLEE

Preliminary Statement

This is an appeal from the order of Honorable John M. Cannella, Judge of the United States District of New York, who, after a non-jury trial, dismissed the complaint for reasons stated in his memorandum which

also constitutes findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. (Appendix at A-3 et. seq., hereinafter ("A"))

Statement of the Case

This is an action for damages by Carl Hollander ("Hollander"), plaintiff-appellant herein, who voluntarily retired early from the Mutual Life Insurance Company of New York, defendant-appellee ("The Company"), on December 1, 1972, at the age of 59 after 36 years of service. (A-2) At the time of his retirement Hollander was an Assistant General Counsel of the Company and had a salary of $32,800. (A-12,22)

In the court below, Hollander claimed that he was entitled to one year's salary under the undisputed terms of a Termination Allowance Plan ("The Plan"), which the Company voluntarily established in 1955 and has since funded. (A-2) The undisputed and pertinent terms of the Plan state:

> "Employees with 10 or more years of completed service; who have not reached age 62; and who terminate voluntarily or otherwise for any reason except death, disability retirement or lay-off; may, solely at the discretion of the Company, be given termination allowances of up to 10 weeks' salary for the first 10 years

of completed service, and up to 2 weeks' salary for each subsequent completed year of service with a maximum allowance of 52 weeks' salary. Such allowance will be considered only:

(a) When the employee's position can be abolished or the salary savings from the replacement at a lower salary are sufficient to recover the amount of the termination allowance within 5 years, or

(b) When in the opinion of the Company it is desirable to encourage the employee to seek employment elsewhere, retire early, or engage in Field Underwriting." (A-84)

The uncontradicted evidence at trial established that 218 employees applied for an allowance from 1963-1972, and awards were made to 132 or approximately 60% of the employees. (A-40-41; 93) Among the applicants were five persons, including Hollander, who were employed in the Law Department in comparable positions with similiar salaries and length of service. Of the five, only one person received an allowance whose termination was desired by the Company, and he received four months pay. (A-76-78; 93 at p. 4)

The evidence also disclosed that Hollander initially requested a termination allowance in 1970, and it was rejected at that time because the Company did not

want him to resign. (A-68-71) The Plan was designed to encourage the early retirement or resignation of employees where it was considered to be in the best interest of the Company. (A-81) It was not designed to provide a bonus to well-regarded employees who wanted to resign or retire early or, in this case, take another job. (A-81) In the hope that Hollander would continue to work for the Company, it did, however, give him a four-month leave of absence with pay upon the understanding that he would return to work, which he did in June, 1971. (A-9-10; 56-7; 68-9) Thereafter, in the fall of 1972, Hollander secured another job and announced that he intended to retire early. (A-72-4) At this time he renewed his prior request for a termination allowance and insisted he was entitled to the equivalent of one year's salary. (A-89,91) This request was also rejected. (A-92) Under cross-examination, plaintiff testified that he understood that the Company retained the right to make or refuse any award and in no way relied upon the existence of the Plan to continue his employment. (A-34-38)

After trial of the matter, the Court dismissed the complaint and issued its findings in a six-page memorandum decision. (A-3)

Statement of the Issues

Did the Court below commit reversible error in dismissing the complaint after a full trial?

ARGUMENT

THE DECISION OF THE TRIAL COURT SHOULD BE AFFIRMED

I. The Decision is Based on Undisputed Facts

The Brief of plaintiff-appellant is an attempt to retry the case before this Court. The basic contention of Hollander is that the Court below should be reversed because it failed to accept his interpretation of undisputed evidence and dismissed the complaint. While conceding that Judge Cannella's decision is not unreasonable, Hollander simply argues that the result is all wrong. Brief for Plaintiff-Appellant 1-10.

In effect, what Hollander is asking this Court to do is beyond the proper scope of appeal. As he admits, Brief of Plaintiff-Appellant at 8, Hollander has a "heavy burden to sustain" in establishing that the findings of Judge Cannella were "clearly erroneous," Rule 52(a), Fed. R. Civ. P., and that burden cannot be met because none of the facts underlying the dispute

were contested. Based upon the undisputed evidence, the Court found that the explicit terms of the Plan granted the Company discretion to make termination allowances. There can be no dispute over this fact, and it is well-settled that the interpretation of such a plan is governed strictly by its published terms, e.g., Gitelson v. DuPont, 268 N.Y.S.2d 11, 17 N.Y.2d 266 (1966); Fernekes v. CMP Industries, 246 N.Y.S.2d 201, 195 N.E.2d 884 (1963). See also Stanley, et al. v. Caltex Petroleum Corporation, et al., 63 Misc.2d 780, 313 N.Y.S.2d 836, aff'd, 3 A.D.2d 1049, 328 N.Y.S.2d 369 (2d Dep't. 1973); Silfen v. United Whelan Corporation, 30 A.D.2d 523, 290 N.Y.S.2d 417 (1st Dep't. 1968), aff'd, 308 N.Y.S.2d 874, 257 N.E.2d 53 (1970).

The Court also found that only 60% of all applicants received any award. Based upon this undisputed fact, the Court rejected the claim by Hollander that the Company uniformly made awards and was convinced by the evidence, including the live testimony of Company officers regarding the method by which decisions were reached (A-61 et seq.), that the policy was not arbitrary. (A-3 at p. 5) Under the circumstances, there is no ground for appeal.

Indeed, an important fact ignored by Hollander is that if the Company had any uniform practice, it was to deny awards under the Plan to executives employed in the Law Department. There was considerable testimony on this very subject from Samuel Cantor, Senior Vice-President for Law and Corporate Affairs of the Company and the department head who refused to approve such an allowance for Hollander in 1970 and again in 1972. (A-66-99) The evidence established that of the five executives in the Law Department, including Hollander, who applied for an allowance, only one received it. (A-76-8; 93 at p. 4) While Hollander may contend, as he does, these facts may be interpreted differently, it cannot be and is not suggested that the findings of the Court are either "clearly erroneous" or unsupported by the evidence.

II. The Exclusion of a Record Summary was Proper

Hollander has also argued that the Court committed reversible error by excluding from evidence a compilation made by him summarizing salary records of 73 employees. Brief of Plaintiff-Appellant at 25. (A-49-52) There is no merit to this argument. Since the claim is the Court did accept into evidence the actual salary

records, it had available to it all the information contained in them. (A-49-52) The summary compiled by Hollander would not alter the facts contained in the records. Moreover, it was Hollander who chose not to testify about the data contained in the salary records but offered his compilation after he had been excused as a witness. (A-59-62) Had the issue been important, he could have been recalled to testify but was not. Even assuming that the summary might have clarified some murky point, there is no reason to believe that its exclusion so prejudiced the trial that the decision must be reversed.

Conclusion

For the foregoing reasons, the decision of the Trial Court below (Cannella, J.) should be affirmed with costs.

Respectfully Submitted,

Rogers & Wells
Attorneys for
Defendant-Appellee
200 Park Avenue
New York, New York 10017

Of Counsel:

John H. Carley

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That on the 25th day of August, 19 77, at the request of Rogers & Wells, Esqs., Attorneys at Law, 200 Park Avenue, New York, New York,
I served three copies of a Brief entitled "Carl F. Hollander vs Mutual Life Insurance Company of New York" on Carl Hollander, Esq., Attorney at Law,

by depositing said 3 copies in postpaid wrapper at 4 p. m. on this day, in the United States Postoffice at Walton, New York, addressed to the above as follows:

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and that there is a regularly established mail route between Old Greenwich, Connecticut, and Walton, New York.

William Finch

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this 25th day of August, 1977.

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